CHOONG OI CHOO

v.

PUBLIC PROSECUTOR & ANOTHER CASE

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL APPEAL NOS. 13 & 14 OF 1984]
12 MAY 1986

CRIMINAL LAW AND PROCEDURE: *Corruption - Section 4(6) of the Prevention of Corruption Act 1961 - Gratification of 5 apples and 6 oranges - Accused fined RM400 - Appeal against conviction by accused and Public Prosecutor - Reasonable doubt; grounds for quashing conviction - Uncorroborated evidence - Materially different testimony by same witness.*

EVIDENCE: *Requirement of corroboration - Independent and reliable testimony - Material issues - Implicates the accused.*

The appellant's husband, a member of the Gerakan Party, had in 1977, applied in writing for a low cost house but had not yet been allocated one. At the material time, the complainant was a Gerakan State Executive Councillor and the Chairman of the State Housing Committee, one of whose functions was the allocation of low cost houses to applicants.

On the date and at the time mentioned in the charge the appellant accompanied by her husband and carrying a plastic bag visited the residence of the complainant with the object of enquiring about her husband's application for a low cost house. The complainant was however not in and the appellant had a conversation with the wife of the complainant. A conversation ensued during which the appellant gave the complainant's wife a bag of fruits containing the apples and oranges. On discovery of the bag of fruits later on, the complainant then reported the matter to the National Bureau of Investigation and the appellant was charged with the offence of corruption under s. 4(6) of the Prevention of Corruption Act 1961. The appellant was convicted on an amended charge and now appeals against that conviction, as does the Public Prosecutor who is contending that the learned President was wrong in amending the charge and that the sentence was inadequate.

The central issue in this case was whether it was proved beyond all reasonable doubt that the fruits were given by the appellant corruptly as an inducement for the complainant to show favour as regards the appellant's husband's application for a low cost house.

Held:

[1] Evidence in corroboration must be independent and reliable testimony touching a material issue which implicates the accused. See per Lord Radcliffe in *Dowse v. Attorney General* [1961] MLJ 249.

[2] After an examination of the relevant testimony the Court held that the appellant had been convicted on the basis that the evidence of the complainant's wife had been corroborated when on the facts, it was not. On this ground alone the conviction is liable to be quashed.

[3] If a witness is proved to have made a statement though unsworn in distinct conflict with his evidence on oath, the proper direction is that his or her testimony is negligible and that the verdict of the Court should be founded on the rest of the evidence - *Harris v. R.* 20 CAR 144. Taking into account all the relevant testimonies of the witnesses, the evidence of

the complainant's wife should have been treated as negligible and there was nothing in the rest of the evidence led by the prosecution to establish that the 5 apples and 6 oranges were given to the complainant as an inducement as alleged in the charge.

[4] It is the intended function of a gift which determines whether it is corrupt or innocent. However it is not possible to lay down objective rules of permissible gifts and hospitality although gifts and hospitality offered to public functionaries are always potentially dangerous. Taking into consideration all the evidence it was held that to the appellant the fruits might well have been intended for the complainant's children (as she had maintained all along) as a form of socially accepted conduct even though to the complainant, it constituted an inducement.

[Appellant's appeal allowed and conviction quashed.]

Cases referred to:
Haw Tua Tau v. Public Prosecutor [1981] CLJ (Rep) 11
R. v. Baskerville [1916] 2 KB 658
Dowse v. Attorney-General [1961] MLJ 249
R. v. Rudge 17 CAR 103
R. v. Smith 18 CAR 19
R. v. Parker 18 CAR 103
R. v. Martin, Ansel and Ross 24 CAR 33
Harris v. R. 20 CAR 144
Regina v. Andrews-Weatherfoil Limited [1972] 1 WLR 118

Legislation referred to:
Prevention of Corruption Act 1961, s. 16
Public Officers (Conduct and Discipline)(Chapter 'D') General Orders 1980, General Orders. 6, 7

For the appellant - Karpal Singh (S.P. Annamalai with him); M/s. Karpal Singh & Co. & M/s. Annamalai & Co.
For the respondent/public prosecutor - Mohammed Bazain bin Idris, DPP

JUDGMENT

Edgar Joseph Jr J:

This appellant, a married woman, aged 47, and a restaurant assistant by occupation, was prosecuted in the Sessions Court Georgetown upon the following charge:

> That you on 1 October 1981 at about 5.30 p.m. at No.7 Lorong Padang Tembak, Air Itam, in the district of Georgetown, in the State of Penang, did corruptly give a gratification of a sum of cash RM400, five apples and six oranges to an agent namely Dato' Khor Gark Khim, Chairman of the Penang Housing Committee, as an inducement to show favour in relation to his principal's affairs, to wit, in connection with the application for a low-cost housing unit submitted by Koay Kim Chye and that you have thereby committed an offence under s. 4(6) of the Prevention of Corruption Act 1961."

In the result, she was convicted on an amended charge, the amendment consisting of the deletion of the words "a sum of cash RM400". That of course meant that she was convicted of giving a gratification of merely 5 apples and 6 oranges as an inducement in return for the favour alleged. She was then sentenced to pay a fine of RM400. She now appeals against that conviction, and the Public Prosecutor has also appealed, contending that the Learned President was wrong in amending the charge and that the sentence passed was inadequate.

I do not propose to state the evidence in detail for that appears sufficiently in the Grounds of Decision of the Learned President. It is sufficient if I deal with what I consider are the obvious facts.

According to the evidence led by the prosecution, the appellant's husband, one Koay Kim Chye, a member of the Gerakan Party, had as long ago as 1977, applied in writing for a low cost house but had not been allocated one even up to the date of the trial and I was informed by Counsel for the appellant from the Bar that that was the position even up to now. At the material time, the Complainant, Datuk Khor Gark Khim, was a Gerakan State Executive Councillor and the Chairman of the State Housing Committee, one of whose functions was the allocation of low cost houses to applicants.

On the date and at the time mentioned in the charge, the appellant, accompanied by her husband and carrying a pink plastic bag, called at the residence of Datuk Khor with the object of meeting him and raising the subject of her husband's application for a low cost house. Datuk Khor however was not in but the servant in the house (PW7) led the appellant into the hall to meet Datin Khor (PW3) while the appellant's husband remained in the kitchen. The couple had, incidentally, come in through the back door.

The appellant met Datin Khor and engaged in conversation. The servant, although not present, overheard inconsequential bits of their conversation to which I shall refer shortly. The result was that the only witness for the prosecution who could testify as to what transpired at the crucial meeting was Datin Khor herself.

Be that as it may, her testimony was to the effect that the appellant showed her a stack of letters which, however, she did not care to read. The appellant also mentioned that she had applied for a low cost house but had not yet been given one. The appellant then asked her to speak to her husband to help her get a unit. Datin Khor then explained, at length, the difficulty of getting one but, the appellant persisted in asking her to intercede. The appellant then tried to hand over to Datin Khor the plastic bag of fruits but the latter refused it, suggesting that appellant take them for her children. It was at this point - so Datin Khor alleged - that the appellant uttered the incriminating words: "Do you think I am so poor I can afford only a few oranges." While Datin Khor insisted the appellant take back the fruits, the telephone rang and Datin Khor left to answer it. She was on the telephone for a short while only and then a male friend arrived whereupon the appellant and her husband left the hall, making their exit through the kitchen door. By then, Datin Khor had completely forgotten about the bag of fruits. Datin Khor then claimed, by way of postscript as it were, that when she was asking the appellant to take back the bag of fruits, she saw a piece of red paper in between the fruits. She thought it was a piece of red paper "such as we sometimes put in when we give friends gifts" but she did not know if it was a red packet.

It is convenient, at this stage, to refer to the evidence of the servant because it was she who noticed the appellant leave the bag of fruits on a table in the hall and then walk out of the hall as Datin Khor continued to speak on the telephone. Like the dutiful servant that she was, she picked up the bag and put it on a table near the fridge. At this stage, she noticed "the fruits very clearly in the bag", and she added, significantly, "Apart from the fruits I did not notice anything else in the bag." However, the next morning she noticed and `ang pow' in the bag. She again said she did not notice anything earlier. So, being curious, she untied the bag which was tied with a knot, took the red packet out of the bag, opened it and discovered a sum of RM400 in denominations of two RM100 notes and four RM50 notes. She then replaced the money in the packet and put the packet back in the bag. However, she did not inform anyone about her discovery.

The next day - that is to say, on the 3 October 1981 - Datin Khor's sister (PW8) visited the Khor's residence. She opened the packet and discovered the RM400. On quering the servant as to who had brought the packet, she received the reply - obviously based on an assumption

- "it was sent by a person the day before". Datin Khor was not then in the house but when she came in later that day, the sister told her of the discovery and asked her why there was an `ang pow' in the bag. Datin Khor replied that she did not know. The sister then put the plastic bag (with the money in it) in the fridge.

When Datuk Khor came home for lunch that day, his wife said that she told him about the money and the fruits. He enquired as to who had brought them in and she replied she did not know as she had not seen them before. She added that a lady-referring no doubt to the appellant - had made a request for a low cost house.

It is now necessary to refer to Datuk Khor's version of the facts. He said when he returned home for lunch on 2 October 1981, he was told by his wife that the day before, a woman had come to make certain enquiries about housing and left a bag of fruits behind.

Datuk Khor then examined the contents of the bag after it was taken out of the fridge and discovered the RM400 and the fruits.

He was then examined as to the purpose of the gift and he said "I don't think the woman explained the purpose of leaving them to my wife" ..."I thought it was not proper for her to leave the fruits behind but I could only guess at the purpose.." "My wife said it was the usual thing..just to give them to my children to eat."

Under cross-examination, Datuk Khor confirmed that the appellant had not told his wife to ask him to give a unit of low cost housing.

Nevertheless, Datuk Khor was convinced that this was in inducement and decided to report the matter to the proper authority. But he did not initially report the matter either to the police or the National Bureau of Investigation. Instead, at the next Exco meeting on 10 October 1981 - a Saturday - he brought along the plastic bag and contents, placed them on the table in the Exco Room and informed those present at the meeting of the incident. He then sought the advice of the Exco and was told to lodge an immediate report with the police of the National Bureau of Investigation. An officer of the National Bureau of Investigation was duly summoned and, on the same day, Datuk Khor made a report and then a statement.

Ten days later - on 20 October 1981 - the appellant and her husband again called at Datuk Khor's residence. Again, Datin Khor was in but not Datuk Khor. The appellant handed to Datin Khor a letter of enquiry (Ex. P7) concerning her husband's application for a low cost house. The appellant then enquired if Datin Khor had told her husband about the application and received an affirmative reply.

A cautioned statement made by the appellant and recorded in writing (Ex. P11A) by an officer of the National Bureau of Investigation was admitted by the Learned President during the case for the prosecution. However, having admitted it, the Learned President found it to be riddled with additions. The statement suggested that the appellant spoke in Mandarin when making the statement whereas the Recording Officer (PW4) said that the appellant spoke in Cantonese. In the result, the Learned President was not prepared to give much weight to it. Be that as it may, the statement appeared to be exculpatory for in it, the appellant merely said that she brought the fruits along because there were some children in Datuk Khor's house and fruits did not count for much. She added it was "not nice to come empty handed to people's house".

There was also an oral statement, allegedly made by the appellant to Mr. Joseph Sebastian, an officer of the National Bureau of Investigation, which the Learned President quite rightly excluded as she was not satisfied as to its voluntariness and accuracy. Similarly, I consider

she was also right in excluding another statement recorded from the appellant on the ground that although the appellant was then under arrest, no caution had been administered to her before it was recorded.

That was the sum of the evidence tendered by the prosecution upon which the Learned President ruled, relying on the Privy Council case of *Haw Tua Tau v. Public Prosecutor*, that there was a case to answer on the original charge.

The appellant elected to give evidence on oath.

The appellant admitted leaving the fruits in Datuk Khor's house but denied she had left the 'ang pow' of RM400 inside it. Her explanation for leaving the fruits was that it was Chinese custom not to go to another's house empty handed. No evidence of such Chinese custom was led by the defence and, had it done so, to show that the gift concerned was customary in any profession, trade, vocation or calling, such evidence would have fallen foul of the provisions of s. 16 of the Prevention of Corruption Act 1961, and been inadmissible. It was clear, however, that the appellant's defence was that the fruits were an innocent gift made spontaneously out of feelings of social generosity and without any evil connotations. In other words, the fruits were never intended as an inducement as alleged in the charge or at all.

At the end of the day, the Learned President was satisfied that upon the evidence of Datin Khor, her sister and her ex servant, there was enough material to find a case against the appellant. She observed that the servant was no longer working for the Khors and had no reason to lie. She was satisfied that all three witnesses were truthful.

On the other hand, she found the appellant to be far from being a truthful witness.

However, she accepted the appellant's denial of knowledge of the presence of the RM400 in the plastic bag. Analysing this part of the case, she reasoned that the RM400 was only discovered the day after the appellant's initial visit. Neither Datin Khor nor her servant had seen it the first day although the former had said she saw something red inside the bag. The bag had been left on the kitchen table and the servant had testified that many people had come to see Datuk Khor on the evening of 1 October 1981. She recognised that the bag had been knotted but noted that it was not in the safe custody of anyone. In effect, she found that the bag was accessible to any visitor to the house and the money might have been out in it by anyone at any time. I can find nothing unreasonable in the Learned President's finding and I have no hesitation in dismissing the Public Prosecutor's appeal against this part of the case.

I shall now turn to what I regard as the central issue in the case. Was it proved beyond all reasonable doubt that the fruits were given by the appellant corruptly as an inducement as alleged in the charge?

The Learned President answered this question in favour of the prosecution.

Stated generally, the grounds on which she rested her decision was the testimony of Datin Khor, her sister and the servant. This is how she put it: "...the evidence of the other witnesses particularly PW3, PW7 and PW8 was sufficient to find a case against the accused. PW7 is now no longer working for the Khors and has no reason to lie. I was satisfied that all three of them were truthful witnesses."

It is implicit in her grounds that the Learned President regarded the testimony of Datin Khor as having been corroborated by that of the other two witnesses. With respect, the testimony of these two witnesses could not constitute such corroboration within the meaning of *R. v. Baskerville* [1916] 2 KB 658.

As regards Datin Khor's sister, she was not even in the house at the time of the appellant's visit. As regards the servant, her testimony was equally consistent with that of Datin Khor and the appellant, as it related to matters which were not in dispute.

It is settled law that evidence in corroboration must be independent and reliable testimony touching a material issue which implicates the accused. This is how Lord Radcliffe put it in *Dowse v. Attorney General* [1961] MLJ 249:

> Their Lordships have no doubt that evidence to be truly corroborative, must be truly probative of the relevant issue; that is, it must positively implicate the accused person and positively show or tend to show the truth of the accomplice's story that the accused committed the offence. A fact which is indiffer.ently consistent with the accomplice's story and the accused's denial of it is neutral and supplies no corroboration.

The sting in Datin Khor's evidence lay in the following extracts from the record in her testimony: "...She was applying for a low cost house and asked me to speak to my husband to help her get one unit...I tried to explain that it was not easy to get a unit...I was explaining to her for quite some time but she still asked me to help. She passed a plastic bag of fruits to me....I told her to take them back for her children. She said **"Do you think I am so poor I can afford only a few oranges."** (Emphasis added)

It was on the above matters that corroboration was required but there was none.

The case is therefore one where the appellant has been convicted on the basis that Datin Khor's evidence was corroborated when it was not. On this ground alone, the conviction is liable to be quashed: [see *R. v. Rudge* 17 CAR 103; *R. v. Smith* 18 CAR 19; *R. v. Parker* 18 CAR 103; *R. v. Martin, Ansel and Ross* 24 CR 33].

That, however, does not complete the picture. What was overlooked all round was that the testimony of Datuk Khor as to what his wife told him regarding the appellant's visit on the very next day was materially different to what she said in Court. The following extracts from his evidence will make this clear:

> On 2 October 1981 when I returned home I was told by my wife that the day before i.e., 1.10, one woman came **to make certain enquiries** about housing and left a bag of fruits behind...
>
> I don't think the woman explained the purpose of leaving them to my wife...
>
> I thought it was not proper for her to leave the fruits behind but I could only guess at the purpose.
>
> My wife said it was **the usual thing - just to give them to my children to eat...**
>
> The person who brought the things did enquire from my wife about their application for a house.

And later, under cross-examination, he said this: **"She did not tell my wife to ask me to give her a unit of low cost housing."** (Emphasis added)

Datin Khor's version given out of Court to her husband the very next day after the appellant's visit was therefore materially different to what she had said in Court.

If a witness is proved to have made a statement though unsworn in distinct conflict with his evidence on oath, the proper direction is that his or her testimony is negligible and that the verdict of the Court should be founded on the rest of the evidence: *Harris v. R.* 20 CAR 144.

For this reason, Datin Khor's testimony should have been treated as negligible and if this were done, there would be nothing in the rest of the evidence led by the prosecution to establish that the five apples and six oranges were given to the complainant as an inducement as alleged in the charge.

On the other hand, the testimony of the appellant was quite consistent with her cautioned statement given soon after her arrest; in both she maintained that the fruits were not intended as an inducement for Datuk Khor but as an innocent gift for his children.

In these circumstances, the question of critical substance at the close of the case for the defence was: Did the appellant give the five apples and six oranges to Datuk Khor as an inducement for him to act in particular way? In other words, did the appellant seek through this gift to induce Datuk Khor to show favour as regards her husband's application for a low cost house?

We recognise a corrupt gift by examining its purpose. It is the intended function of a gift which determines whether it is corrupt or innocent. This is the reason why what may be given as a bribe may be accepted as an innocent present and vice versa: *Regina v. Andrews-Weatherfoil Limited* [1972] 1 WLR 118.

Speaking generally, gifts and hospitality may be so extravagant that the only reasonable inference is that they are made with a corrupt intent. On the other hand, isolated gifts of a trivial character or inexpensive seasonal gifts (such as calendars) and conventional hospitality, provided it is small and reasonable in the circumstances, are part of the normal courtesies of life everywhere; although accepted practice in these matters may vary to some extent.

It is therefore not possible to lay down objective rules of permissible gifts and hospitality. Such matters are rigorously controlled in the civil service by ss. 6 & 7 of the Public Officers (Conduct and Discipline) (Chapter "D") General Orders, 1980. Be that as it may, gifts and hospitality offered to public functionaries are always potentially dangerous.

There is another facet to the problem and it is this: a person with corrupt intentions may use apparently innocent gifts and hospitality to assess the strength of character of the functionary and, when he senses a vulnerable individual, will gradually increase his largesse to a point where the functionary finds that he has built up an improper degree of obligation to the donor. It was not suggested that the appellant in this case was such a person.

I have not overlooked the fact that the appellant had gone to Datuk Khor's house although previously she had been to his office. But against this are two facts: first, both Datuk Khor and the appellant's husband belonged to the Gerakan Party and, second, there was evidence in the prosecution's case showing that it was usual for visitors to call at Datuk Khor's house daily. Certainly, if the appellant had called at Datuk Khor's house merely to enquire about her husband's long standing application which according to Datuk Khor is what his wife had told him when he returned home for lunch on 2 October 1981 - then I can find nothing sinister in the appellant's visit.

After anxiously scrutinizing the evidence, I cannot confidently answer the question of critical substance posed above in favour of the prosecution. To the appellant, the fruits might well have been intended for Datuk Khor's children as a form of socially accepted conduct even though to Datuk Khor, it constituted an inducement.

In all the circumstances, the appeal is allowed, the conviction quashed, the fine if paid is to be refunded and the appellant acquitted and discharged.

Also found at [1986] 2 CLJ 231